

IN THE MISSOURI SUPREME COURT

No. SC92800

STATE OF MISSOURI, *ex rel.*, TIM E. DOLLAR, THE LAW OFFICES
OF TIM E. DOLLAR, n/k/a DOLLAR, BURNS & BECKER, LLC,
MICHAEL P. HEALY, and THE HEALY LAW FIRM, LLC
Relators,

v.

THE HON. SANDRA C. MIDKIFF, JUDGE OF THE CIRCUIT
COURT OF JACKSON COUNTY, MISSOURI, KANSAS CITY,
Respondent,

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	4
POINTS RELIED ON	12
POINT I	12
POINT II	13
STANDARD OF REVIEW APPLICABLE TO ALL POINTS	16
LIMITATIONS APPLICABLE TO ALL COUNTS	17
ARGUMENT	18
POINT I	18
POINT II	37
CONCLUSION	80
CERTIFICATE OF SERVICE	81
RULE 84.06(c) CERTIFICATION	81

TABLE OF AUTHORITIES

Court Rules

Supreme Court Rule 4-1.4(a)(1)	.....	27, 68
FRCP 49	.....	22
FRCP 51	.....	20, 21, 24, 34
FRCP 59	.....	22, 23, 25, 27-28, 30, 34

Statutes

§ 516.100 RSMo. (2005)	.....	1, 9, 11, 13-18, 36, 38, 46, 54, 56, 58-59, 62, 64, 74, 78, 80
§ 516.120 RSMo. (2005)	.....	12-16
§ 516.280 RSMo. (2005)	.....	15, 63, 69

Cases

<u>Alvarado v. H&R Block</u> , 24 S.W.3d 236	.....	38, 45, 63, 80
(Mo.App. W.D. 2000)		
<u>Arst v. Max Barken, Inc.</u> , 655 S.W.2d 845,		1, 14, 46-47, 62-63
(Mo.App. E.D. 1983)	.....
<u>Ball v. Friese Construction Co.</u> , 348 S.W.3d		1, 47
172 (Mo.App. E.D. 2011)	.....

<u>Burnett v. Griffith</u> , 739 S.W.2d 712 (Mo. 1987)	..... 35, 54
<u>Cain v. Hershewe</u> , 760 S.W.2d 146 (Mo.App. S.D. 1988)	..... 13, 40, 55,
<u>Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc.</u> , 61 F.3d 639 (8 th Cir. 1995)	..... 20-21
<u>Cook v. Desoto Fuels, Inc.</u> , 169 S.W.3d 94 (Mo.App. E.D. 2005)	..... 16, 64, 79
<u>Davis v. Laclede Gas Co.</u> , 603 S.W.2D 544 (Mo. banc 1980)	..... 16, 58, 62, 64, 79
<u>Dixon v. Shafton</u> , 649 S.W.2d 435 (Mo. banc 1983)	..... 42, 69,
<u>E.E.O.C. v. Southwestern Bell Telephone, L.P.</u> , 550 F.3d 704 (FN 3) (8 th Cir. 2008)	..... 21, 23, 25
<u>Eddleman v. Dowd</u> , 648 S.W.2d 632 (Mo.App. E.D. 1983)	..... 13, 39, 55, 59
<u>Edgar v. Fitzpatrick</u> , 377 S.W.2d 314 (Mo. banc 1964)	..... 17, 37

<u>Farm Bureau Mut. Ins. Co. v. Broadie</u> , 558 S.W.2d 751 (Mo.App. S.D. 1977)	..... 17
<u>Ferrellgas</u> , 190 S.W.3d 615 (Mo.App. W.D. 2006)	..... 42, 77
<u>Friedman & Friedman, Ltd. v. McCandless, Inc.</u> , 606 F.3d 494 (8 th Cir. 2010)	..... 22-23
<u>Hasemeier v. Metro Sales, Inc.</u> , 699 S.W.2d 439 (Mo.App. E.D. 1985)	..... 14, 47,
<u>Horstmyer v. Black & Decker, Inc.</u> , 151 F.3d 765 (8 th Cir. Mo. 1998)	..... 20-21, 50
<u>Johnson v. Buehler</u> , 767 S.W.2d 351 (Mo.App. E.D. 1989)	..... 3
<u>Johnson v. Schmidt</u> , 719 S.W.2d 825 (Mo.App. W.D. 1986)	..... 3
<u>Jordan v. Willens</u> , 937 S.W.2d 294 (Mo.App. W.D. 1996)	..... 32, 51
<u>Joyce v. Armstrong Teasdale, LLP</u> , 635 F.3d 364 (8 th Cir. 2011)	..... 14, 67, 70, 75, 77

<u>Klemme v. Best</u> , 941 S.W.2d 493 (Mo. banc 1997)	64, 66, 68, 71, 75
<u>Linden v. CNH America, LLC</u> , 673 F.3d 829 (8 th Cir. 2012)	25
<u>Linn Reorganized School Dist. No. 2 of Osage County v. Butler Mfg. Co.</u> , 672 S.W.2d 340 (Mo. banc 1984)	14, 55-62, 80
<u>M&D Enterprises, Inc. v. Wolff</u> , 923 S.W.2d 389 (Mo.App. S.D. 1996)	12, 42, 56, 62-63, 77,
<u>Margolies v. McCleary, Inc.</u> , 447 F.3d 1115 (8th Cir. 2006)	14, 22, 33-35, 43, 45, 49, 51
<u>Martin v. Crowley</u> , 702 S.W.2d 57 (Mo. banc 1985)	21, 44
<u>Powel v. Chaminade</u> , 197 S.W.3d 576 (Mo. banc 2006)	12-15, 27, 29-30, 33, 39, 61-62, 70, 73-75, 78
<u>Producers Produce Co. v. Industrial Commission</u> , 291 S.W.2d 166 (Mo. banc 1956)	17

<u>State ex rel. Heidelberg v. Holden</u> , 98 S.W.3d 116 (Mo.App. S.D. 2003)	16, 45
<u>State ex rel. Marianist Province Of the United States v. Ross</u> , 258 S.W.3d 809 (Mo. banc 2008)	16
<u>State ex rel. McKeage v. Cordonnier</u> , 357 S.W.3d 597 (Mo. banc 2012)	46
<u>Unitherm Food Systems, Inc. v. Swift- Eckrich, Inc.</u> , 546 U.S. 394 (2006)	21, 23, 25
<u>Verbrugge v. Abc Seamless Steel Siding</u> , 157 S.W.3d 298 (Mo.App. S.D. 2005)	56, 58
<u>Wallace v. Helbig</u> , 963 S.W.2d 360 (Mo.App. E.D. 1998)	13, 40, 55
<u>Wilson v. Lodwick</u> , 96 S.W.3d 879, (Mo.App. W.D. 2002)	12, 15, 27, 42-43
<u>Wright v. Campbell</u> , 277 S.W.3d 771 (Mo.App. W.D. 2009)	12, 32, 51, 64, 66, 72
<u>Zero Mfg. Co. v. Husch</u> , 743 S.W.2d 439 (Mo.App. E.D. 1987)	14, 29-30, 64, 71

INTRODUCTION

If Plaintiff sustained multiple items of damage, the statute of limitations did not begin running until the last item of damage was sustained and ascertainable so that full and complete relief may be obtained. Section 516.100; *see also*, Ball v. Friese Construction Co., 348 S.W.3d 172, 178-79 (Mo.App. E.D. 2011) (*citing* Arst v. Max Barken, Inc., 655 S.W.2d 845, 847-48 (Mo.App. E.D. 1983)).

In the underlying litigation Plaintiff received substantial verdicts that were reduced by the trial court on February 25, 2005, because of Relators' verdict duplication errors, and were reduced again on May 19, 2006, because of Relators' *McGinnis Rule* violation. Relators argue that their two wrongs were only one, or that the separateness is immaterial because they occurred on the same date. *See*, Relators' *Brief* at 12-13, 16-18. Both arguments fail. The legal wrongs, whether single or separate, did not cause Plaintiff to sustain ascertainable damages before March 10, 2006, until they became final, after Relators' failed efforts to avoid their effects on appeal.

The course of Missouri law determining when the statute of limitations begins to run in legal malpractice cases is a well-trodden one. The Relators though seek to forge a new path, often disregarding the compass directions of the very cases they cite. They focus on the "capable

of ascertainment” phrase – that is not determinative – to the neglect of the meaning of “damages” – a word that is determinative.

Focusing on events mid-course in litigation, such as a potentially transient reduction in the jury’s verdict by the trial court, Relators’ *Brief* cites inapposite cases for their contention that such an event made Plaintiff capable of ascertaining that it had been damaged by Relators’ negligence. Just as every convicted offender sitting in prison is capable of ascertaining his loss of liberty, that loss of liberty does not become “damages” until a court’s order setting aside the conviction becomes final.¹

Similarly, most litigants may “be capable of ascertaining” that they have suffered setbacks when a trial court dismisses a count, excludes or allows an expert, admits or refuses critical evidence, or upholds or reduces a verdict. Those setbacks do not damage the litigants when entered because

¹ There are exceptions to the rule, not applicable here; e.g., when existing counsel confess wrongs to the client or when separate counsel is engaged, the running of statute of limitations is triggered. *See, Wilson v. Lodwick*, 96 S.W.3d 879, 883-4 (Mo.App. W.D. 2002).

they are potentially transient. Until the course of succeeding events unfolds these setbacks are transient or mere possible damages.²

This need to wait until damages are substantially complete is why prisoners may not sue their defense attorneys until the convictions are set aside: because they have no legally cognizable damages.³ To hold otherwise necessarily steps off the well-trodden course of Missouri law as to when the statute of limitations for a legal malpractice claim begins to run, as discussed *infra*. Stepping off that course would signal to prisoners to sue their lawyers sooner, even while the post-conviction proceeding drags on, and it would tell aggrieved litigants to distrust their current attorneys and hire malpractice attorneys to get claims on file, irrespective of whether grievance-generating setbacks ever end up causing damages to the litigants.

² Unlike here, some mid-litigation setbacks cause immediate non-transient damages, as where a consent injunction is entered, triggering the running of the statute of limitations. *See, M&D Enterprises, Inc. v. Wolff*, 923 S.W.2d 389 (Mo.App. S.D. 1996).

³ *Johnson v. Schmidt*, 719 S.W.2d 825, 826 (Mo.App. W.D. 1986) (until successful in post-conviction relief, prisoner cannot “show how he has been damaged”); *see also Johnson v. Buehler*, 767 S.W.2d 351 (Mo.App. E.D. 1989) (*citing Schmidt*).

While obstacles and setbacks abound in litigation, many, or even most, do not become legal injuries ultimately causing cognizable damage. Focusing on “capable of ascertainment”, as defendants do, would depart from the principled path that damages must be substantially complete – *non-transient* – and it would alter the fine balance that Missouri courts have established as to when aggrieved litigants, prisoners, and others must file their legal malpractice claims. Respondent correctly applied these bedrock principles in this cause. And the Court of Appeals properly denied Relators’ application for a writ. This Court should quash the preliminary writ and deny Relators’ *Petition*.

STATEMENT OF FACTS

A. HISTORY

1. Underlying Litigation

Plaintiff hired Relators to represent it in a federal lawsuit pending before Honorable Fernando Gaitan (“Judge Gaitan”) involving contract (breach as well as good faith and fair dealing claims) and fraud claims seeking \$8.6 M in damages (“underlying litigation”). *Facts 1, 3, (Appendix at A7); Exhibit Z*, paras. 1-8 (LF at 234-35). Before trial Relators counseled Plaintiff that it should not expect to recover its full \$8.6 M of damages for

various reasons suggesting that a \$4 M verdict would be a good result .

Facts 10-12 (Appendix at A8-9); Exhibit CC (LF at 305-06).

Relators knew that Plaintiff's \$8.6 M in damages was factually indivisible. *See, Relators' Brief* at 2. Relators requested the full \$8.6 M at trial and the jury attempted to award the full amount giving \$4.3 M for the contract claim and \$4.3 M on the fraud claim. *See, Relators' Brief* at 3-4; *see also, Facts 12, 22 (Appendix at A9-10) and Exhibit B (LF at 009-11).* Relators did not educate the jury that, per "*Jury Instruction 9*", it had to award \$8.6 M on each claim supported by the evidence, even under the special interrogatories. *See, Appendix at A27; see also, Exhibit DD (LF at 340) and Exhibit F (LF at 036-58).*

The jury then subdivided the original \$4.3 M in contract verdicts between the breach and the good faith and fair dealing claims and entered "special verdicts" of \$2.15 for each. *See, Relators' Brief* at 3-4; *see also, Fact 22 (Appendix at A10) and Exhibit C (LF at 012-014).* Relators did not educate the jury that, per "*Jury Instruction 7*", it could only hold the corporate defendant liable to the extent it held at least one of its individual agents liable. *See, Appendix at A25; see also, Relators' supplemental Exhibit 8 at 8 and Exhibit F (LF at 036-58).* The jury found the corporate and individual defendants liable on the fraud claim, but only awarded

damages against the corporate defendant. *See*, Relators’ *Brief* at 3; *see also*, *Fact 22 (Appendix at A10)* and Exhibits B-C (LF at 008-14). At a bench conference after the jury’s verdicts were read and before the jury was discharged, Relators opined that the verdicts were cumulative and did not have either the duplication errors or the *McGinnis Rule* error corrected before the jury was discharged. *See*, Exhibit F (LF at 036-58); *see also*, Exhibit CC (LF at 309).

On February 25, 2005, Judge Gaitan reduced the contract verdicts by \$2.15 M ruling they recovered duplicate contract and good faith and fair dealing damages and denied the defendants’ post-trial motion seeking to vacate the \$4.3 M fraud verdict for violating the *McGinnis Rule*.⁴ *Facts 24*,

⁴ Margolies v. McCleary, Inc., 447 F.3d 1115, 1124-26 (8th Cir. 2006)

(“There is no question that the ‘*McGinnis* Doctrine’ is the law in Missouri’. ‘*McGinnis* holds that when a claim is submitted on the theory of respondeat superior and the jury returns inconsistent verdicts, exonerating the employee, but holding against the employer, the court must grant the employer judgment notwithstanding the verdict. [...] “The doctrine applies not only to the fact of liability, but also to the amount of damages assessed: ‘A principal whose liability is purely derivative cannot be held liable for

40 (*Appendix* at A10, A13); Exhibit CC (LF at 316); Exhibit D (LF at 015-17). Accordingly, Judge Gaitan entered judgment for \$6.45 M and his rulings were appealed. *Id.* Unbeknownst to Plaintiff, however, Relators had not preserved nor appealed the Judge Gaitan's rejection of their single-line "Verdict Form C". Exhibit T (LF at 090).

On May 19, 2006, the Eighth Circuit Court of Appeals affirmed Judge Gaitan's \$2.15 M reduction for duplication error.⁵ *Fact 55* (*Appendix* at A15); Exhibit CC (LF at 321-22). On May 19, 2006, it also held that the

actual damages more than the amount awarded against its agent."')(internal citations omitted).

⁵ Margolies v. McCleary, Inc., *supra*, 1125 (8th Cir. 2006) ("The question remains, however, whether, given the proof in this case, the claims were either inconsistent or duplicative. The district court so held, and we see no error in that ruling, at least with respect to duplication. Heartland itself stated that the evidence on the claim that McCleary breached its contract promise to distribute Guy's brand products, and the evidence that McCleary did not use good faith to distribute the brand throughout the contract territory 'is nearly identical.' We agree, but omit the word 'nearly.'") (this is the Eighth Circuit Court of Appeals' opinion in the underlying litigation).

fraud verdict violated the *McGinnis Rule* and reduced the judgment by an additional \$4.3 M.⁶ *Fact 56* (*Appendix* at A15); Exhibit CC (LF at 322).

Plaintiff alleges that Relators engaged in additional wrongful conduct after the verdicts were entered, each causing separate items of damage and all occurring after March 10, 2006. Exhibit Z, paras. 5-29 (LF at 239-55); Exhibit L (LF at 072-76); Exhibit V at 67, lns. 15-23 71, lns. 1-16, 90, lns. 6-24, 93, lns. 19-25, 94, lns. 1-2 and lns. 18-25, 95, lns. 1-25, 96, 97, lns. 1-10, 99, lns. 25 and 100, lns 1-23, 128, 129, lns. 1-16, 130, lns. 4-25, 131, lns. 1-23. 134, lns. 23-25, 135 (LF at 118-53); Exhibit W at 36, lns. 5-13 (LF at 159-96).

Relators first advised Plaintiff that it had to accept the \$2.15 M judgment and had no further viable appellate options after May 19, 2006. *Facts 57, 60* (*Appendix* at A15, A16); Exhibit CC (LF at 322-24). After May 19, 2006, Relators took a fifty percent fee, based on representing Plaintiff through the appeal. *Fact 62* (*Appendix* at A16); Exhibit CC (LF at 324).

⁶ Margolies, *supra*, at 1125 (“In the absence of any other viable theory of corporate wrongdoing supported by the record, we have no alternative than to reduce the damages assessed against McCleary to match the verdict against its agents.”).

2. Instant Claims

On March 10, 2011, Plaintiff filed this suit against Relators for legal malpractice seeking recovery of damages including the \$2.15 and \$4.3 M reductions. *Fact 8* (*Appendix* at A8); Exhibit AA (LF at 258). Plaintiff has alleged additional wrongs and items of damages, e.g. concealing their errors, taking unearned attorneys' fees and attorneys' fees incurred in otherwise unnecessary ancillary litigation resulting from attorneys' negligence, all occurring after March 10, 2006 – within five years of filing suit. *Fact 8* (*Appendix* at A8); Exhibit AA (LF at 258); Exhibit Z (LF at 239-55). After Plaintiff amended its petition, Relators filed their amended motion to dismiss, which was denied to permit the issue to be decided on summary judgment after discovery limited to the statute of limitations issues. *See*, Relators' Exhibits 4-5.

After the limited discovery concluded, Relators filed their motion for summary judgment arguing that Section 516.100 barred Plaintiff's claims, since it had sustained ascertainable damages on February 25, 2005, when Judge Gaitain reduced the damages by \$2.15 M. *See*, Relators' Exhibit 6. Relators argued that the May 19, 2006, \$4.3 M reduction increased the damages originally sustained on February 25, 2005, and was not a separate item of damage. *Id.* Respondent denied Relators' motion, ruling that the

statute of limitations could not have commenced running before March 10, 2006, because there were multiple wrongs and at least one item of damage was unascertainable before May 19, 2006, when the Eighth Circuit reduced the judgment by an additional \$4.3M. *See*, Relators' Exhibit 7.

B. WRIT

Relators filed their *Petition* claiming that Respondent erred as a matter of law because Plaintiff pleaded but one wrong, i.e. that Relators allowed the jury to divide indivisible damages, leading to one item of damage (\$2.15 M on February 25, 2005) that grew over time (\$4.3 M on May 19, 2006). *See*, Relators' *Suggestions In Support Of Prohibition* at 10-21. Alternatively, Relators' argued that the ultimate and unitary wrong was that they failed to correct the errors before the jury was discharged. *Id.* at 14-15. Relators argued further that, even assuming "distinct and separate claims of malpractice as Respondent contends, the claim relating to [Relators'] jury instructions and verdict form submission would be barred[,] because both wrongs occurred on the same date. *Id.* at 12-13. Finally, Relators argued that the February 25, 2005, reduction was sufficient to put a reasonably prudent layperson in Plaintiff's situation on notice of a potentially actionable injury, thus triggering the statute. *Id.* at 10-20. The Western District denied Relators' *Petition* and this Court entered a preliminary writ.

C. RESPONDENT'S RULING

Of the several independent reasons Plaintiff argued it timely filed its claims, Respondent ruled that at least one item of Plaintiff's damages was not ascertainable before May 19, 2006, when the Eighth Circuit vacated the \$4.3 M fraud verdict for violating the *McGinnis Rule*.⁷ Thus, Plaintiff's March 10, 2011, filing in this cause was within the requisite five year limitations period of Section 516.100. Respondent applied the statute ruling that Plaintiff pleaded multiple wrongs and items of damages, with at least one item of damage becoming ascertainable after March 10, 2006, five years prior to Plaintiff's suit being filed. (LF at 239-55).

⁷ Plaintiff has pleaded separate wrongs and damages occurring after May 19, 2006. For example, Relators took attorneys' fees of fifty percent even after the Eighth Circuit explained that their errors had damaged Plaintiff. For this discussion, though, Plaintiff treats May 19, 2006, as the date of its last item of ascertainable damages. See, Exhibit Z, Plaintiffs *First-Amended Petition And Affirmative Avoidances* ("*First-Amended Petition*") (LF at 239-55); see also, II (B).

POINTS RELIED ON

I. THE PRELIMINARY WRIT SHOULD BE QUASHED AND RELATORS' PETITION DENIED, BECAUSE RESPONDENT CORRECTLY RULED THAT PLAINTIFF'S PETITION WAS TIMELY FILED, IN THAT, TO THE EXTENT RELATORS' POINT RELIED ON IS CORRECT, THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL PLAINTIFF ACTUALLY DISCOVERED RELATORS' FAILURE TO APPEAL, WHICH WAS AFTER MARCH 10, 2006.

Powel v. Chaminade, 197 S.W.3d 576 (Mo. banc 2006).

M&D Enterprises, Inc. v. Wolff, 923 S.W.2d 389 (Mo.App. S.D. 1996).

Wilson v. Lodwick, 96 S.W.3d 879 (Mo.App. W.D. 2002).

Wright v. Campbell, 277 S.W.3d 771 (Mo.App. W.D. 2009).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

II. THE PRELIMINARY WRIT SHOULD BE QUASHED AND RELATORS' PETITION DENIED, BECAUSE RESPONDENT CORRECTLY RULED THAT PLAINTIFF'S PETITION WAS TIMELY FILED, IN THAT RESPONDENT ARRIVED AT THE CORRECT RESULT SINCE:

(A) PLAINTIFF COULD NOT HAVE SUCCESSFULLY MAINTAINED A SUIT TO RECOVER ITS DAMAGES, AS IT HAD SUSTAINED NO ASCERTAINABLE DAMAGE BEFORE MARCH 10, 2006.

Powel v. Chaminade, 197 S.W.3d 576 (Mo. banc 2006).

Eddleman v. Dowd, 648 S.W.2d 632 (Mo.App. E.D. 1983).

Cain v. Hershewe, 760 S.W.2d 146 (Mo.App. S.D. 1988).

Wallace v. Helbig, 963 S.W.2d 360 (Mo.App. E.D. 1998).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

(B) PRESUMING THAT PLAINTIFF SUSTAINED ANY DAMAGE BEFORE MARCH 10, 2006, IT SUSTAINED AT LEAST ONE ADDITIONAL ITEM OF DAMAGE ON MAY 19, 2006, WHEN THE EIGHTH CIRCUIT COURT OF APPEALS VACATED THE \$4.3 M IN FRAUD DAMAGES.

Margolies v. McCleary, Inc., 447 F.3d 1115 (8th Cir. 2006).

Arst v. Max Barken, Inc., 655 S.W.2d 845 (Mo.App. E.D. 1983).

Hasemeier v. Metro Sales, Inc., 699 S.W.2d 439 (Mo.App. E.D. 1985).

Linn Reorganized School Dist. No. 2 of Osage County v. Butler Mfg. Co., 672 S.W.2d 340 (Mo. banc 1984).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

(C) NO REASONABLY PRUDENT PERSON IN PLAINTIFF'S CIRCUMSTANCES COULD HAVE ASCERTAINED DAMAGES BEFORE MARCH 10, 2006.

Powel v. Chaminade, 197 S.W.3d 576 (Mo. banc 2006).

Zero Mfg. Co. v. Husch, 743 S.W.2d 439 (Mo.App. E.D. 1987).

Anderson v. Griffin, Dysart, Taylor, Penner & Lay, 684 S.W.2d 858 (Mo.App. W.D. 1984).

Joyce v. Armstrong Teasdale, LLP, 635 F.3d 364 (8th Cir. 2011).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

Section 516.280 (RSMo. 2005).

(D) PRIOR TO MARCH 10, 2006, UNDER THE RELEVANT FACTS OF THIS CASE, A REASONABLY PRUDENT LAYPERSON IN PLAINTIFF’S POSITION COULD NOT HAVE BEEN ON NOTICE OF THE WRONGS AND NOMINAL IMMEDIATE INJURY THEREFROM, NOR THAT *SUBSTANTIAL NON-TRANSIENT* DAMAGE HAD RESULTED AND WAS CAPABLE OF ASCERTAINMENT.

Powel v. Chaminade, 197 S.W.3d 576 (Mo. banc 2006).

Anderson v. Griffin, Dysart, Taylor, Penner & Lay, 684 S.W.2d 858

(Mo.App. W.D. 1984).

Joyce v. Armstrong Teasdale, LLP, 635 F.3d 364 (8th Cir. 2011).

Wilson v. Lodwick, 96 S.W.3d 879 (Mo.App. W.D. 2002).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

Section 516.280 (RSMo. 2005).

(E) ALTERNATIVELY, IF THIS COURT FINDS THAT PLAINTIFF’S LAST ITEM OF DAMAGE DID NOT DELAY ACCRUAL OF ALL OF PLAINTIFF’S CLAIMS, IT SHOULD DENY RELATORS’ PETITION FOR WRIT AS TO DAMAGES THAT WERE NOT ASCERTAINABLE UNTIL AFTER MARCH 10, 2006.

Davis v. Laclede Gas Co., 603 S.W.2D 544 (Mo. banc 1980).

Cook v. Desoto Fuels, Inc., 169 S.W.3d 94 (Mo.App. E.D. 2005).

Section 516.100 (RSMo. 2005).

Section 516.120 (RSMo. 2005).

STANDARD APPLICABLE TO ALL POINTS

Writs of prohibition are discretionary and should only issue to prevent an abuse of discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial authority. State ex rel. Marianist Province Of the United States v. Ross, 258 S.W.3d 809, 810 (Mo. banc 2008). A writ is not to serve as a remedy for all legal difficulties, but it is an extraordinary remedy that should lie only in cases of extreme necessity. State ex rel. Heidelberg v. Holden, 98 S.W.3d 116, 117 (Mo.App. S.D. 2003).

Respondent’s ruling is presumed correct and the burden of overcoming that presumption and showing that the court exceeded its jurisdiction is on Relators. Id. If Respondent reached the correct result for

the wrong reasons, the ruling should not be disturbed on appeal. Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751, 753 (Mo.App. S.D. 1977) (A correct result by a lower court will not be disturbed on appeal merely because the it “assigned an incomplete or erroneous reason for its judgment.”); *citing*, Edgar v. Fitzpatrick, 377 S.W.2d 314, 318 (Mo. banc 1964); Producers Produce Co. v. Industrial Commission, 291 S.W.2d 166, 170 (Mo. banc 1956).

Prohibition may be proper to enforce a statute of limitations. Marianist, *supra*, at 810. When the statute of limitations began running is usually a legal question. “However, when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide.” Powel v. Chaminade, 197 S.W.3d 576, 585 (Mo. banc 2006) (internal citations omitted).

APPLICABLE STATUTE OF LIMITATIONS

All of Plaintiff’s claims are governed by Section 516.100 RSMo.,⁸ which provides:

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following

⁸ All statutory references are to 2005.

sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but *when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.* RSMo. (2005) (emphasis added).

ARGUMENT

I. THE PRELIMINARY WRIT SHOULD BE QUASHED AND RELATORS' PETITION DENIED, BECAUSE RESPONDENT CORRECTLY RULED THAT PLAINTIFF'S PETITION WAS TIMELY FILED, IN THAT, TO THE EXTENT RELATORS' POINT RELIED ON IS CORRECT, THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL PLAINTIFF ACTUALLY DISCOVERED RELATORS' FAILURE TO APPEAL, WHICH WAS AFTER MARCH 10, 2006.

A. RELATORS' ARGUMENT IS SELF-DEFEATING

To the extent this Court accepts as true Relators' reduction of Plaintiff's *First-Amended Petition* to a claim that Judge Gaitan's rejection of

their proposed “Verdict Form C”⁹ with a single damages line and use of a verdict form¹⁰ with multiple damages lines erroneously divided indivisible damages and singularly caused all of Plaintiff’s damages arising from Relators’ representation, their failure to preserve and appeal that error deviated from the standard of care and was negligent.¹¹ If Plaintiff’s damages were avoidable by appealing Judge Gaitan’s rejection of “Verdict Form C” and use of a multi-lined verdict form, then Relators had the duty to preserve the error for appeal by raising timely and specific objections to its use at trial and to request a new trial on damages as alternative relief in post-trial motions and on appeal. *Compare to Point II (B) 2. a. i.*, and footnote 21; *compare also*, Exhibit X (LF at 204-05).

⁹ Exhibit A (LF at 004-006) (*Appendix* at A65-67).

¹⁰ Exhibit B (LF at 008-011).

¹¹ Even assuming no instructional error, Plaintiff has alleged Relators committed multiple wrongs, e.g. failing to correct jury verdicts dividing indivisible damages and failing to harmonize the impossible fraud verdict under the *McGinnis Rule*, and caused separate items of damages, which were sustained and became ascertainable on February 25, 2005 and May 19, 2006, respectively. *See*, Exhibit Z, *First-Amended Petition* (LF at 241-248).

In Horstmyer v. Black & Decker, Inc., the court provided:

Absent plain error, appellants must raise specific objections to the form or content of jury instructions, including special interrogatories, before the district court in order to preserve such matters for appeal.

[I]f a party fails to raise a specific objection in the trial court to the form or contents of an interrogatory, it cannot raise that objection for the first time on appeal. Our law on this subject is crystal clear: [T]o preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record.

151 F.3d 765, 770-71 (8th Cir. Mo. 1998) (internal citations omitted, brackets in original). *See also*, Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc., 61 F.3d 639, 643 (8th Cir. 1995) (holding that Rule 51 requires a litigant to give specific objections to a jury instruction before the jury retires; otherwise, the right on appeal to object to a jury instruction on those grounds is waived).

B. RELATORS WAIVED CLAIMED ERROR

Relators tendered “Verdict Form C” as an alternative to the verdict form submitted based on the alleged insufficiency of evidence supporting a multi-lined verdict form. Relators, however, made no other objection to any

other instruction or special interrogatory. *See, Relators' Brief*, at 2-3; *see also*, Exhibit 4 (LF at 36-45) and *Appendix* at . Any error with any instruction other than the single-line verdict form, including the special interrogatories was, therefore, waived. Rule 51; *see, Horstmyer and Commercial Property Invs., Inc., supra; see also, E.E.O.C. v. Southwestern Bell Telephone, L.P., citing Unitherm Food Systems, Inc. v. Swift-Eckrich, infra*. Thus, to the extent the use of special interrogatories contributed to cause \$2.15 M in damages, Relators waived that error. Relators contend, however, that there was no error other than Judge Gaitan's use of a multi-lined verdict form instead of "Verdict Form C". If so, Plaintiff has alleged that Relators failed to preserve and appeal what they now identify as the sole error in the case. *Id.*

Plaintiff has alleged that Relators failed to preserve errors resulting from Judge Gaitan's rejection of "Verdict Form C".¹² *See, Exhibit Z*, paras. 9-17, 22-23, 32(c)(g)(k), 40(c)(g)(k) and 48 (c)(g)(k) (LF at 241-248).

¹² This allegation is sufficient to deny Relators' motion to dismiss, because it is presumed true. *Martin v. Crowley*, 702 S.W.2d 57 (Mo. banc 1985) ("Reviewing dismissal of plaintiff's petition, we allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff").

Whether Relators made timely and sufficient objections by tendering “Verdict Form C” at trial under Rules 49-51, it is undisputed that Relators did not request a new trial on damages in Rule 59 post-trial motions.

Instead, Relators only sought to “clarify” the verdicts in post-trial motions, arguing that they were cumulative. (LF at 015-17). Relators made this flawed argument despite previously admitting on the record that Plaintiff’s \$8.6 M in damages was indivisible. *See*, Relators’ *Brief* at 2-3; *see also*, Exhibit F (LF at 036-58) and *Appendix* at A45-65. Relators knew, or should have known, that pursuing multiple legal theories seeking recovery of indivisible damages meant they had to request the full \$8.6 M on each theory supported by the evidence. *See*, “*Jury Instruction 9*”, Exhibit DD (LF at 340) (*Appendix* at A27); *see also*, Margolies, *supra*, 1125-26 and Friedman & Friedman, Ltd. v. Tim McCandless, Inc., 606 F.3d 494, 499-503 (8th Cir. 2010).

Whether using a multi-lined verdict form was reversible error or not, when confronted by the jury’s division of indivisible damages, Relators should have corrected the error before the jury was discharged. *See*, Margolies, *supra*, 1124-26. If use of the multi-lined verdict form was reversible error and Relators failed to correct the jury’s division of indivisible damages before the jury was discharged, then Relators should

have argued, at least alternatively, that Plaintiff was entitled to a new trial on damages in Rule 59 post-trial motions and on appeal. *See*, Exhibit CC, para. 41 (LF at 316), Exhibit K (LF at 170-171) and Exhibit U (LF at 115). By not correcting the jury's division of indivisible damages or preserving a request for a new trial in post-trial motions, Relators deprived Plaintiff of that relief on appeal. *See*, Exhibit F (LF at 036-58); *see also*, Exhibit D (LF at 015-17). E.E.O.C. v. Southwestern Bell Telephone, L.P., 550 F.3d 704, 711 (FN 3) (8th Cir. 2008), *citing* Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 404 (2006) ("We note that appellant's failure to file a Rule 59 motion after the entry of judgment would also preclude our review of any request for a new trial on appeal.").

C. VERDICT FORM C

Relators could have objected to Judge Gaitan's multi-lined verdict form on the basis that it inaccurately stated the law or was unsupported by the evidence, or both. Friedman & Friedman, Ltd. v. McCandless, Inc., 606 F.3d 494, 409 (8th Cir. 2010). Relators, however, only objected that the multi-lined verdict form was unsupported by the evidence. *See*, Exhibit F (LF at 36-58); *see also*, *Appendix* at A45-64.

On pages 2-3 of their *Brief* Relators suggest that they objected to the multi-lined verdict form submitted at trial by paraphrasing their tender of

single-lined “Verdict Form C” stating “... [*sic*] there is no way to divide the damages between the fraud claims and the breach of contract and good faith and fair dealing claims ... [*sic*] therefore, the proper instruction is verdict form C which I will now tender.” This objection was not directed to any other instruction or special interrogatory submitted to the jury. *See, Exhibit F* (LF at 36-58); *see also, Appendix* at A45-64.

Relators’ *full* statement reveals that their objection at trial was to the *sufficiency of evidence* supporting a multi-lined verdict form:

As C, it's verdict C. The verdict in this case, verdict C, proposed by the [Relators] sets forth each of the different claims against the individual [McCleary] defendants in five separate findings that the jury would have to make, but it only includes one finding for actual damages.

[Relators contend] that there is no way to divide the damages between the fraud claims and the breach of contract and good faith and fair dealing claims, and asking the jury to engage in such division *is not supported by the evidence, and that, therefore, the proper instruction is verdict form C*, which I will now tender.

See, Exhibit F (LF at 36-58); *see also, Appendix* at A45-64 (emphasis added). Assuming that this objection satisfied Rule 51, it was limited to the *sufficiency of the evidence* to support a multi-lined verdict form.

Since Relators' sole objection went to the sufficiency of evidence supporting a multi-lined verdict form, they had the duty to raise the error in Rule 59 post-trial motions. E.E.O.C., supra; *see also*, Linden v. CNH America, LLC, 673 F.3d 829, 832-33 (8th Cir. 2012), *discussing Unitherm, supra* (if the complaining party did not request a new trial before the district court per Rules 50 (a), 50 (b) *or* 59, an appellate court may not grant a new trial on appeal). By failing to request a new trial on damages, at least in the alternative, Relators waived Plaintiff's right to request a new trial on damages on appeal. Assuming Relators' claim that Judge Gaitan's use of a multi-lined verdict form was reversible error, this deprived Plaintiff of any meaningful chance of success on appeal.

D. RELATORS SHOULD HAVE EXPLAINED WAIVER TO PLAINTIFF

If prior to March 10, 2006, the only error was using a multi-lined verdict form, then Relators knew, or should have known, that Plaintiff's only chance of avoiding at least \$4.3 M in damages was to correct the jury's division of indivisible damages before the jury was discharged and to preserve the error by seeking a reversal or new trial on damages in Rule 59 post-trial motions and, if necessary, on appeal.

Whether the multi-lined verdict form was reversible error or not, Relators admit knowing that their legal theories sought recovery of indivisible damages. *See*, Relators' *Brief* at 3-4; *see also*, Exhibit F (LF at 36-58) and *Appendix* at A45-64. Thus, Relators knew, or should have known, that when the jury initially divided \$8.6 M, \$4.3 M on each of the contract and fraud verdicts, that Plaintiff could only collect \$4.3 M.¹³ By failing to correct the impermissible division before the jury was discharged or preserve the error in post-trial motions, Relators negligently deprived

¹³ Not coincidentally, Relators persuaded Plaintiff to, if given the chance on appeal, accept \$4.3 M. *See*, *Fact 48* (*Appendix* at A14). This demonstrates that Relators knew that \$4.3 M was Plaintiff's best-case scenario in light of the verdict duplication error and their waiver of it on appeal; assuming, of course, that the \$4.3 M fraud verdict was affirmed on appeal. Thus, Relators knew, subject to the outcome of the appeal, that they had likely damaged Plaintiff at least \$4.3 M in damages and that they should have advised Plaintiff to hire independent counsel. Had they discharged their fiduciary duties by promptly disclosing this error, it would have triggered the statute running. *See*, Wilson v. Lodwick, 96 S.W.3d 879, 883-84 (Mo.App. W.D. 2002); *see also*, *Point II (C)-(D)*.

Plaintiff of the benefit of appealing what they now characterize as the sole error causing all of Plaintiff's damages.

If Relators' actions were intentional, then Relators had the duty to explain to Plaintiff that they were not correcting the jury's division of indivisible damages before the jury was discharged. Further, before the time for filing Rule 59 motions had expired, Relators should have explained to Plaintiff that they were not preserving what they now claim was the only reversible error for appeal, even as an alternative to their argument that the McCleary defendants invited instructional error or that the verdicts were cumulative. At that point Plaintiff could have hired new counsel. *See*, Missouri Supreme Court Rule 4-1.4(a)(1); *see also*, Anderson, *supra*, 860-63. At least after the time for filing Rule 59 motions had expired, Relators should have informed Plaintiff that it should retain independent counsel because they could no longer represent Plaintiff since they had failed to preserve the only error and chance for relief on appeal. *Id.*

Either action would have commenced the statute running, because Plaintiff would have incurred damages independent of the outcome of the appeal in the form of otherwise unnecessary attorneys' fees. Powel v. Chaminade, 197 S.W.3d 576, 578 (Mo. banc 2006); *see also*, Wilson v. Lodwick, 96 S.W.3d 879, 883-84 (Mo.App. W.D. 2002) and M& D.

Enterprises Inc. v. Wolff, 923 S.W.2d 389, 395-97 (Mo.App. S.D. 1996).

Relators made no such disclosures to Plaintiff. In fact, Relators concealed this information from Plaintiff. *See, First-Amended Petition*, paras. 10-14, 17-23, 32 (a) – (l), 40 (a) – (l) and 48 (a) – (l), Exhibit Z (LF at 239-255); *see also, Facts 45-46 (Appendix at A14)*.

E. RELATORS' CONCEALED THEIR WAIVER AND MISLED PLAINTIFF

Relators claim to have consulted Plaintiff about whether to appeal the judgment, suggesting that Plaintiff agreed to appeal only if the McCleary defendants appealed. *See, Fact 37 (Appendix at A12)*; *see also, Exhibit CC* (LF at 315), Exhibit V at 101, Ins. 5-21 (LF at 118-158) and Exhibit W at 67, Ins. 1-15 (LF at 159-196). If, as Relators now assert, the sole error in the case was using a verdict form that divided indivisible damages, Relators should have advised Plaintiff of that fact. Setting aside Relators' failure to correct the jury's division of indivisible damages before the jury was discharged, Relators should have advised Plaintiff that it had to seek a new trial on damages as alternative relief in Rule 59 post-trial motions and on appeal, or that it would likely sustain \$4.3 M in damages as a result of the duplication error. In violation of their fiduciary duties of fidelity and loyalty

owed Plaintiff, Relators did not explain these issues to Plaintiff. *See, Facts 44-46 (Appendix at A13-14).*

Nonetheless, when Plaintiff allegedly agreed to cross-appeal if the McCleary defendants appealed, Relators knew, or should have known, that Plaintiff expected them to cross-appeal all issues necessary to avoid any and all damages even if it meant a new trial on damages. Since Relators knew that the verdicts divided indivisible damages, they at least alternatively, should have requested a new trial on damages in post-trial motions. By failing to timely correct the duplicate verdicts and timely request a new trial on damages, Relators' post-trial advice was conflicted and negligent. The law did not require Plaintiff to understand the complexities of instructional error or to second-guess Relators' advice. Zero Mfg. Co. v. Husch, *supra*, 441 (Mo.App. E.D. 1987); Anderson v. Griffin, Dysart, Taylor, Penner & Lay, 684 S.W.2d 858 (Mo.App. W.D. 1984); Joyce v. Armstrong Teasdale, LLP, 635 F.3d 364, 368 (8th Cir. 2011). Thus, Plaintiff could not have been on notice of a potentially actionable legal injury before March 10, 2006. *See, Powel*, *supra*, 578.

Each time Relators reassured Plaintiff that the only error in the case was Judge Gaitan's rejection of "Verdict Form C" they misled Plaintiff into believing that it had a meaningful chance of succeeding on appeal. That is

because, if using the multi-lined verdict form was reversible error, Relators concealed the fact that they had failed to preserve that error at trial or as a basis for relief in a Rule 59 motion and had failed to take it up on appeal.¹⁴ Because of Relators' continued misrepresentation of facts material to their representation of Plaintiff and its chances of success on appeal, Plaintiff reasonably concluded that Relators were protecting its interests when they were not. On these facts no reasonably prudent person could have ascertained being damaged before March 10, 2006. *See, Powel*, at 578; *Joyce*, at 368; *Zero Mfg.*, at 441 and *Anderson*, at 858.

¹⁴ This point is made in the alternative. It is consistent with Respondent's primary argument that Plaintiff had sustained no ascertainable, non-transient damages upon Judge Gaitan's February 25, 2005, \$2.15 M verdict reduction since the appeal was pending and Plaintiff had not sustained any ascertainable damage independent of the outcome of the appeal. *See, Eddelman v. Dowd*, 648 S.W.2d 632, 633 (Mo.App. E.D. 1983), *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo.App. S.D. 1988) and *Wallace v. Helbig*, 963 S.W.2d 360, 361-62 (Mo.App. E.D. 1988); *see also, Point I*. The writ should be denied on either basis, or both.

**F. PLAINTIFF DID NOT LEARN THAT RELATORS HAD
FAILED TO PRESERVE OR APPEAL THE CLAIMED ERROR
BEFORE MARCH 10, 2006**

Despite neither preserving nor appealing what Relators now identify as the singular error in the case, before and after March 10, 2006, Relators represented to Plaintiff that it had a reasonable chance of being made whole on appeal, or at least maintaining \$6.45 M in damages. *See, Facts 31-34 51-54 (Appendix at A11-13, A14-15)*. In light of having waived meaningful review of the verdict duplication error at trial and in post-trial motions, Relators knew, or should have known, that Plaintiff had virtually no chance of recovering more than \$4.3 M.¹⁵ *See, Exhibit W (LF at 171)*.

Regardless of whether Relators concealed material facts from Plaintiff, it is undisputed that Plaintiff did not learn of Relators' failure to timely correct, preserve or appeal what they now identify as the sole error resulting from Judge Gaitan's rejection of "Verdict Form C" before March 10, 2006, and Plaintiff has alleged that fact. *See, First-Amended Petition, Exhibit Z (LF at 239-255); see also, Exhibit T (LF at 090)*.

¹⁵ Again, demonstrating consciousness of culpability, Relators persuaded Plaintiff to accept \$4.3 M, if given the chance on appeal. *See, Facts 48-50 (Appendix at A14)*.

G. SPECIAL RULE APPLIES

Missouri has adopted a special rule on when the statute of limitations begins running against attorneys for failing to timely preserve and appeal trial court error. The statute only commences running when the aggrieved client actually discovers the failure.

In Wright v. Campbell, the court summarized:

[A] claim for malpractice for failure to file an appeal arises as soon as the client [actually] learns that the time for appeal has elapsed." *Id.* at 294. As with the non-filing of a timely notice of appeal, where a petition is not timely filed there is no outwardly-observable event that would alert a client to his attorney's alleged misfeasance. In the absence of any known or reasonably knowable circumstances which would impose on the client a duty to double-check the attorney's proper performance of his professional obligations, the mere passage of a mandatory time deadline on an underlying claim is not sufficient to commence the limitations period on a legal malpractice action.

277 S.W.3d 771, 775, 777 (Mo.App. W.D 2009); *quoting*, Jordan v. Willens, 937 S.W.2d 294-95 (Mo.App. W.D. 1996).

Assuming that using the multi-lined verdict form was reversible error, Plaintiff did not learn of Relators' failure to timely preserve or timely appeal

what they now characterize as the only error causing all of Plaintiff's damages before March 10, 2006, or within five years of filing this suit. To the contrary, Relators told Plaintiff they had appealed and protected its interests, when, by failing to timely preserve Plaintiff's right to a new trial, they had not. On these facts there was no "outwardly-observable event" to alert Plaintiff of Relators' negligence. Thus, the statute could not have commenced running as a matter of law. *Id.*; *see also*, Powel, *supra*, 578.

H. RELATORS NEGLIGENT WHETHER OR NOT USING THE MULTI-LINED VERDICT FORM WAS REVERSIBLE ERROR

Assuming that using a multi-lined verdict form was reversible error, Plaintiff's suit was timely filed because Plaintiff did not learn of Relators' failure to timely preserve and appeal that error before March 10, 2006. Having pleaded multiple wrongs and separate items of damage, Plaintiff does not, however, agree with Relators' point. Either way Respondent, as affirmed by the Western District Court of Appeals, correctly ruled that Plaintiff's suit was timely filed.

Since Relators knew that their various legal theories sought recovery of factually indivisible damages at trial, they knew, or should have known, that the jury had to award the full \$8.6 M on each theory it found supported by the evidence to avoid damages from duplication errors. Margolies,

supra, 1125. If using a multi-lined verdict form was reversible error, Plaintiff has alleged that Relators were negligent by failing to timely and specifically object to the use of multi-lined special interrogatories at trial under Rule 51, by failing to educate the jury on how to avoid duplicating verdicts when completing the forms, by failing to identify and correct the duplicate verdicts before the jury was discharged and by waiving Plaintiff's right to a new trial on damages by failing to raise it in Rule 59 post-trial motions and on appeal.

Plaintiff, moreover, has alleged that, whether Judge Gaitan's use of the multi-lined verdict forms was reversible error or not, Relators mishandled the fraud instructions and failed to identify and correct a *McGinnis Rule* violation with the fraud verdict. *See, Exhibit Z* (LF at 239-255). In light of "*Jury Instruction 7*" correctly instructing the jury on *respondeat superior* liability, in closing argument Relators should have illustrated to the jury how to complete the verdict forms by entering \$8.6 M in damages against *both* the corporate *and* individual defendants on the verdict form. *See, "Jury Instruction 7" (Appendix at A25); see also, Margolies, supra*, 1124-26. Plaintiff has further alleged that Relators should have identified the *McGinnis Rule* violation and harmonized the verdicts

before the jury was discharged. *See, Margolies, supra*, 1124-26, *citing, Burnett v. Griffith*, 739 S.W.2d 712, 715 (Mo. 1987).

These failures directly led to the Eighth Circuit's reduction of \$4.3 M in fraud damages on May 19, 2006. *Id.* This error would have occurred whether Judge Gaitan used multi or single-lined verdict forms, because Relators kept the individual defendants in the suit and submitted separate fraud verdict directors for each defendant. This entitled each defendant to a finding of liability as a named party to the suit. *See, "Jury Instruction 7" (Appendix at A25); see also, "Jury Instructions 12-17" (Appendix at A30-35).*

On this record it is clear that both errors contributed to cause \$6.45 M in combined damages. Thus, on the facts here Relators could have avoided causing Plaintiff \$6.45 M in damages, only by avoiding both the duplication errors and the *McGinnis Rule* error. Relators' argument that in some hypothetical sense the only error was dividing indivisible damages is a meaningless, since the *facts are* that multiple errors caused Plaintiff discredet damages sustained and ascertainable on different dates. Thus, assuming that Respondent ruled correctly that Plaintiff sustained ascertainable damage upon Judge Gaitan's February 25, 2005, \$2.15 M reduction, Respondent ruled correctly that Plaintiff sustained a second item of ascertainable damage

upon the Eighth Circuit's further reduction of \$4.3 M on May 19, 2006.

There is not other logical result.

I. CONCLUSION

Regardless of instructional error, Relators were negligent by failing to take reasonable steps to avoid damaging Plaintiff. Relators' attempt to reduce the errors to one, i.e. dividing indivisible damages, is contrary to the facts and should be rejected. Further, Relators', application of Section 516.100 should be rejected as a matter of law because it would moot its language providing that the statute does not commence running until a plaintiff's last item of damage is sustained and ascertainable. Relators' application would allow negligent attorneys to avoid all liability when successive wrongs committed during ongoing litigation contribute to cause separate items of damages occurring on different dates, even when at least one item of damage occurred within five years of a plaintiff filing suit.

II. THE PRELIMINARY WRIT SHOULD BE QUASHED AND RELATORS' PETITION DENIED, BECAUSE RESPONDENT CORRECTLY RULED THAT PLAINTIFF'S PETITION WAS TIMELY FILED, IN THAT RESPONDENT ARRIVED AT THE CORRECT RESULT SINCE:¹⁶

(A) PLAINTIFF COULD NOT HAVE SUCCESSFULLY MAINTAINED A SUIT TO RECOVER DAMAGES AS IT HAD SUSTAINED NO ASCERTAINABLE DAMAGE BEFORE MARCH 10, 2006.

After the February 25, 2005, reduction it was reasonable for Plaintiff to have concluded that it could have been made whole in the ongoing, underlying litigation. As such, its damages were not ascertainable by March 10, 2006, as an objective matter. The test for when damage has been sustained and is ascertainable in Missouri is a practical one, i.e. when the plaintiff could have first successfully maintained a cause of action to fully

¹⁶ Whatever Respondent wrote when denying summary judgment, the result was correct and should be affirmed. Edgar v. Fitzpatrick, 377 S.W.2d 314, 318 (Mo. banc 1964).

recover damages.¹⁷ Section 516.100. This commonsense approach is good policy because it would be unjust to count a period of time against a plaintiff for limitations purposes when the plaintiff could not have successfully maintained the suit to recover full and complete damages.

This “maintainability” test was summarized in Alvarado v. H&R Block:

Damage is sustained and capable of ascertainment when it can be discovered or made known, not when the plaintiff actually discovers the injury or wrongful conduct, even though the amount of damage is unascertained. In applying this test, the courts have held that a cause of action accrues when an injury is *complete as a legal injury*. This occurs when the plaintiff could have first maintained the action.

24 S.W.3d 236, 242 (Mo.App. W.D. 2000) (internal citations omitted)(emphasis added).

¹⁷ Relators cite approvingly but incompletely to the following cases, Anderson, supra, at 860 (“[T]he test is to “ascertain when plaintiff could have first maintained the action to a successful suit”); M&D Enterprises, Inc., supra, at 394 (“The test is when the plaintiff could have first successfully maintained the action), *citing*, Modern Tractor & Supply Co. v. Leo Journagan Constr. Co., 863 S.W.2d 949, 952 (Mo.App. S.D. 1993).

Had Plaintiff filed the instant claims against Relators while the underlying action was pending – or for statute of limitations purposes at least on or before March 10, 2006, the trial court would have dismissed the claims as premature since damages were not complete as a legal injury until the underlying action became final, or Relators told Plaintiff that it had to accept the reduced verdicts and had no viable appellate options or that they had made mistakes and it should hire outside legal counsel at additional cost. Powel, *supra*, at 578 (a cause of action does not accrue until “*substantial, non-transient damage **had resulted*** and was capable of ascertainment.” (emphasis added). This reveals the primary flaw in Relators’ argument.

In Eddleman v. Dowd the plaintiff filed a legal malpractice claim while the underlying claim giving rise to the malpractice action remained pending – as Relators insist Plaintiff could, and should, have done – but the court dismissed the plaintiff’s claims, holding:

However, for plaintiff to prevail in this legal malpractice action, he must establish not only [attorney’s] alleged professional negligence but also that [attorney’s] professional negligence proximately caused damage to him. Plaintiff can prove no such damages presently [...]
This underlying lawsuit remains pending. So long as this underlying lawsuit remains pending, plaintiff cannot show [attorney’s]

professional negligence proximately caused damage. He may yet recover in the underlying lawsuit and may never suffer any damages. 648 S.W.2d 632, 633 (Mo.App. E.D. 1983) (internal citations omitted).

Identically, in Cain v. Hershewe, the malpractice plaintiff filed a legal malpractice claim while the underlying litigation was pending and the court held:

To recover for legal malpractice a plaintiff must establish the lawyer's negligence, some loss or injury, and a causal connection between the negligence and the loss [...] The record before us indicates that the underlying suits against Wilson and Scott remain pending. Cain may yet recover in those suits and may never suffer any damages. Thus, Cain cannot presently prove any damages flowing from the defendants' professional negligence and his suit against these defendants is premature.

760 S.W.2d 146, 149 (Mo.App. S.D. 1988) (internal citations omitted).

It is undisputed that the underlying litigation in this case remained pending on March 10, 2006. At that point Plaintiff had not certainly sustained an ascertainable item of damage in the underlying litigation or some other fact of damage independent of its outcome. The court in Wallace held that the statute did not commence running until the declaratory

judgment action was final, because, like here, the plaintiff only had a claim if he lost in the underlying suit. The court provided:

We find that the statute of limitations began to run [...] when the trial court entered a declaratory judgment [...] against [plaintiff] which determined that the insurance policy provided by [defendant] did not provide coverage for the [...] cause of action against [plaintiff]. One effect of the declaratory judgment was to obligate [plaintiff] for his own attorney's fees and expenses in the declaratory judgment suit which could be recovered only from [defendant]. In the event the court had declared there was coverage, [plaintiff] would not have had a cause of action against [defendant] under any recognized legal theory and any expenses in resolving the dispute in favor of coverage, would not be an obligation of [defendant]. However, the judgment declaring no coverage gave [plaintiff] a claim for existing damages, attorney's fees and litigation expenses, and activated the period of limitations.

963 S.W.2d at 361-62.

In special circumstances not present here, Missouri courts have held the statute may begin to run against a legal malpractice claim while the underlying suit giving rise to the claim remains pending. Those special

circumstances include a patently bad result that can be avoided – if at all – with otherwise unnecessary expenditures on appeal (Ferrellgas, 190 S.W.3d 615, 617 (Mo.App. W.D. 2006)); evidence of a consent judgment causing unavoidable damages independent of the outcome of the pending litigation (M&D Enterprises, *supra*, at 395-97); or, that the plaintiff knew of the defendant attorney’s actionable conduct *and* hired independent legal counsel incurring an otherwise unnecessary cost (Dixon v. Shafton, 649 S.W.2d 435, 439 (Mo. banc 1983)).

This last rule was succinctly stated in Wilson v. Lodwick:

That the expenditure of attorney fees can constitute an accrual of damages is not a new concept [...] While we agree that attorney fees can constitute accrued damages, the expenditure of those fees is not itself conclusive. ‘The lesson of Dixon is that the statute of limitations on a malpractice claim against a lawyer begins running when the clients become aware of the facts constituting the alleged malpractice, realize they are facing a claim by reason thereof, and sustain damage [...] In other words, *the client’s expenditure of money for attorney fees alone does not necessarily trigger accrual of a cause of action; it is the expending of money for attorney fees in realization*

that the client is subjected to harm or exposed to a claim that triggers accrual of a cause of action.

96 S.W.3d 879, 883-84 (Mo.App. W.D. 2002) (emphasis added); *see also*, English v. Hershewe, 312 S.W.3d 402, 408-09 (Mo.App. S.D. 2010) (In a legal malpractice case, the plaintiff cannot state a claim when the fact of damage depends on the outcome of pending litigation and the statute does not commence running until it is final).

While the fees Relators' charged Plaintiff in this case increased from 40% to 50% upon appeal, this was not ascertainable *non-transient* damage independent of the outcome of the underlying litigation and did not trigger the statute running. *Fact No. 9. (Appendix at A8)*. Contrary to Wilson, the additional 10% was not expended with the knowledge that the additional cost was caused by Relators' negligence. *Id.* Additionally, the escalated fees were neither new nor caused exclusively by Relators' negligence. They were in the parties' original contract. *Fact No. 23, 38 (Appendix at A10, A13)*. Plus, the defendants in the underlying action appealed issues unrelated to Relators' negligence. *Fact No. 38 (Appendix at A13)*; *see also*, Relators' *Brief* at 4 and Margolies, *supra*, at 1115 (8th Cir. 2006). Thus, Plaintiff did not incur the fees uniquely as the result of Relators' negligence.

Because Plaintiff had not sustained ascertainable damage independent of the outcome of the appeal by March 10, 2006, the *Preliminary Writ* should be quashed and Relators' *Petition* denied.

II. (B) PRESUMING THAT PLAINTIFF SUSTAINED ANY DAMAGE BEFORE MARCH 10, 2006, IT SUSTAINED AT LEAST ONE ADDITIONAL ITEM OF DAMAGE ON MAY 19, 2006, WHEN THE EIGHTH CIRCUIT COURT OF APPEALS VACATED THE \$4.3 M IN FRAUD DAMAGES;

1. RELEVANT FACTS

The record supports Respondent's ruling, because, *inter alia*, Plaintiff sufficiently pleaded facts and averments in its *First-Amended Petition* that, if assumed true and given their broadest intendment, establish at least two distinct and separate wrongs causing separate items of damage, i.e. a verdict duplication error and a violation of the *McGinnis Rule*. Martin, *supra*, 57.

Plaintiff alleged in its *First-Amended Petition* and the record on summary judgment establishes that both wrongs occurred during the course of Relators' active representation in the incomplete, underlying litigation and that each wrong led to separate damages, i.e. \$2.15 M on February 25, 2005, for the verdict duplication error and an additional \$4.15 M on May 19, 2006, for the *McGinnis Rule* violation, for a total of \$6.45 M of liquidated

damages. *See, Margolies, supra*, at 1124-26. Plaintiff also alleged post-trial actionable conduct causing separate items of damage that were unascertainable before March 10, 2006. Plaintiff should be freely given leave to amend for any technical pleading defects. Rule 55.33(a).

2. ANALYSIS

a. If Multiple Wrongs and Separate Items of Damages, then Statute of Limitations Did Not Commence Running Before March 10, 2006

i. *Duplication Error Caused \$2.15 M in Damages, McGinnis Rule Error Caused \$4.3 M in Damages*

We may assume *arguendo*, and as Respondent ruled, that Judge Gaitan’s \$2.15 M reduction stemming from the verdict duplication error constituted sustained and ascertainable damages when it became a matter of record on February 25, 2005 – even though it was not substantially “complete as a legal injury” before May 19, 2006. *See, State ex rel. Heidelberg v. Holden*, 98 S.W.3d 116, 117 (Mo.App. S.D. 2003) (Respondent’s ruling presumed correct); *see also, Alvarado v. H&R Block, supra*, 242 (“[T]he courts have held that a cause of action accrues when an injury is *complete as a legal injury*. This occurs when the plaintiff could have first maintained the action.”) (emphasis added).

If the February 25, 2005, reduction on the record was the key to rendering ascertainable Plaintiff's first item of damage, the same reasoning means that the second item of damage was necessarily unascertainable before the May 19, 2006, reduction on the record.¹⁸ It would have been an abuse of discretion for Respondent to rule otherwise. Section 516.100; *see also*, State ex rel. McKeage v. Cordonnier, 357 S.W.3d 597, 599 (Mo. banc 2012) ("An abuse of discretion occurs if the circuit court's decision 'is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration.'") (internal citations omitted).

With separate items of damage here, the statute did not commence running until after damage resulting from the last item was "sustained and capable of ascertainment" so that "all resulting damage may [have been] recovered, and the full and complete relief obtained". Section 516.100. The court in Arst explained:

Only when there is more than one item of damage does the cause of action accrue, so as to begin only after the last wrong has been

¹⁸ Plaintiff alleges that Judge Gaitan's \$2.15 M reduction on February 25, 2005, was not a fact of damage that had certainly been sustained before May 19, 2006. If so, the statute could not have begun running before then. Section 516.100; *see also*, *Point I*.

completed. When there is only one wrong which results in continuing damage, as in the case at bar, the cause of action accrues when that wrong is committed and the damage is sustained and capable of ascertainment.

Arst v. Max Barken, Inc., 655 S.W.2d 845, 847-48 (Mo.App. E.D. 1983); *see also*, Ball v. Friese Constr. Co., 348 S.W.3d 172, 178-79 (Mo.App. E.D. 2011) (the statute did not delay since only one wrong, not multiple wrongs were alleged) (*citing*, Arst, *supra*) and Hasemeier v. Metro Sales, Inc., 699 S.W.2d 439, 442 (Mo.App. E.D. 1985) (concluding that statute did not delay because “[t]here was only one item of wrong here, the damage which appellants knew when their right to sue arose.”)¹⁹

¹⁹ With multiple wrongs and separate items of damage there is no doubt that the statute cannot commence running until the last item of damage is sustained and ascertainable. Despite Arst, *et al.*, the language of Section 516.100 does not mention multiple wrongs. Instead, it expressly provides that with multiple items of damage the statute does not commence running until the last item of damage is sustained and capable of ascertainment. Section 516.100; *see also*, Arst, Ball, Hasemeier, *supra*; *compare with*, Linn and Verbrugge; *see also*, *Point II (B)*.

Relators tacitly admit that, if Plaintiff has alleged multiple wrongs and items of damage, Respondent's ruling is correct by arguing that Plaintiff has alleged but one wrong, i.e. allowing the jury to divide indivisible damages. Then Relators counter-factually assert that the *McGinnis Rule* violation stemmed from allowing the jury to divide indivisible damages. *See*, Relators' *Brief* at 17-18.

Just reading the record in this cause disposes of Relators' assertion. Plaintiff has alleged at least two separate and independent wrongs, i.e. verdict duplication errors and a *McGinnis Rule* violation, each causing discreet items of damage, \$2.15 (February 25, 2005) and \$4.3 M (May 19, 2006) respectively. (LF at 224-238). The wrongs are of the same nature in the sense that they relate to defective verdicts, but remain distinct acts. If this Court finds some pleading deficiency in this regard, Plaintiff should freely be given leave to file an amended petition to cure the deficiency. Rule 55.33(a).

The proof begins with the jury instructions. Relators proposed and consented to submitting three different theories to recover the same \$8.6 M in damages. *Fact 14* (*Appendix* at A9); Exhibit CC (LF at 306). Relators could have elected to submit on a single theory. Submitting on just fraud, for example, would have eliminated verdict duplication risk. This, however,

would have done nothing to alter the *McGinnis Rule* error risk, since the individual defendants would have remained in the case.

That Relators proposed and consented to a separate verdict director for the fraud claim that recovered the same damages as the contract claims did not require Relators elect to keep the individual defendants named in the suit before submitting the case to the jury.²⁰ Dismissing the individual defendants would have eliminated the *McGinnis Rule* violation risk, because their names could not have appeared on the verdict form. Margolies v. McCleary, Inc., *supra*, 1124-26. Eliminating the *McGinnis Rule* violation risk by dismissing the individual defendants would, however, have done nothing to obviate the duplication error risks.

The duplication error risk did not uniquely cause Judge Gaitan to submit the fraud verdict form with separate damages lines for each defendant. Relators submitted a fraud verdict director against each defendant. *See*, “*Jury Instructions 12-17*” (*Appendix* at 30-35). It was, therefore, within the trial court’s discretion to include lines for finding each

²⁰ Had Relators’ determined that there was some advantage to keeping the individual defendants named in the suit, thus creating the risk of impossible verdicts under the *McGinnis Rule*, they should have been hyper-vigilant about detecting and correcting verdict errors.

named defendant liable on the fraud verdict form even had Relators submitted just the fraud theory of recovery. *See, Horstmyer, supra*, 771-73 broad discretion case. The *McGinnis Rule* error was not caused by, or dependent upon, submitting multiple legal theories or by using special interrogatories to break down damages by legal theory.

In fact, Relator Dollar admitted that the multi-line verdict form was not error as it was used, testifying, “Q. What error did you perceive with the multi-line verdict form? A. There wasn’t any -- Q. So it's not error, so a multi-line verdict form . . . was not an error? A. No, not in the way it was done.” (LF at 204-205).²¹

²¹ Even if error, Relators did not raise the claim in post-trial motions or on appeal. Healy testified at deposition, “Q. So what mistake did you tell Mark that Giatan [*sic*] had made? A. Well, for clarification's point, my prior testimony did indicate that the discussion that I had with Mr. Stisser included my belief that the \$2.5 million reduction should not have occurred, that my single-line damages verdict form ought to have applied, and that this could form a basis of an appeal if McCleary appealed.” (LF at 170-71); *see also*, Eighth Circuit Transcript at 25, “THE COURT: But you're not, you're not appealing that issue I guess. MR. HEALY: – well the – THE COURT: The, the verdict form. MR. HEALY: – well we're not, we're saying no we,

Whether or not it was reversible error to use the multiple-lined verdict form and special interrogatories, Relators should have explained to the jury that, if it believed any one of the defendants caused Plaintiff \$8.6 M in damages “as a direct result [of] the elements set forth in” any of the claims submitted, it had to award the full \$8.6 M of damages against each defendant supported by the evidence. *See*, “*Jury Instruction 9*” (LF at 340) (*Appendix A27*). This would have avoided the duplication error and allowed Plaintiff to recover \$8.6 M on the contract and good faith and fair dealing claims.

Yet, had Relators failed to explain to the jury that the corporate entity’s liability was dependent upon, and co-extensive with, finding at least one of the individual defendants liable for \$8.6 M, the fraud verdict would still have been reversed as a matter of law. Margolies, *supra*, at 1124-26.

what, the only error that the judge made throughout the case was – THE COURT: You're saying is they got what they asked for.” (LF at 115).

Plaintiff pleaded that Relators’ failure to appeal Judge Gaitan’s refusal of “Verdict Form C” constituted a separate wrong that was not discovered by Plaintiff until after March 10, 2006. Under the special rule applicable to failing to appeal, the statute does not commence running until it is actually discovered. *See*, Wright, *infra*, at 777 and Jordan, *infra*, at 294-95; *see also*, *Point I*.

Respondent correctly ruled that Plaintiff's "two 'items of damage' or claims of damage are separate and distinct. One is not necessary [*sic*] tied causally or factually to the other." See, Relators' Exhibit 7 at 4 (Bates 181). This hypothetical does not establish that using a multi-lined verdict form was the sole, but-for cause of Plaintiff's damages. Since each error contributed to cause Plaintiff's damages, Relators' premise is flawed.

In closing argument Relators should have demonstrated to the jury how to complete the verdict forms by awarding \$8.6 M in damages against each defendant, which would have kept the fraud verdict intact. Then Plaintiff would have recovered the full \$8.6 M on the fraud claim even though the duplication error persisted. There were two separate, independent errors leading to separate items of damage.

That the results would have been different had Relators only made mistakes relating to the verdict duplication error or to the *McGinnis Rule* violation, but not both, proves that there were at least two wrongs causing discreet items of damage. Had Relators only made the verdict duplication error between the \$4.3 M contract verdicts and the \$4.3 M fraud verdict, Plaintiff would have kept, at least, the \$4.3 M fraud verdict because it would have rendered any additional duplication error between the \$2.15 M breach of contract and \$2.15 M good faith and fair dealing verdicts moot. If

theoretically the remaining \$2.15 M contact verdict did not duplicate the fraud damages, the result could have been \$6.45 M, as Judge Gaitan ruled. Either way, the final judgment would have been greater than \$2.15 M.

In any event, Judge Gaitan would have entered judgment for \$8.6 M to avoid duplication, but it would not have damaged Plaintiff, because it would have left a single \$8.6 M verdict intact. This does not establish that duplication error was the sole but-for cause of all of Plaintiff's damages, because both errors directly contributed to final damages. Each mistake caused a discreet item of damage during Relators' active representation in ongoing litigation, with at least one item of damage being unascertainable before May 19, 2006. Accordingly, Plaintiff timely filed this cause on March 10, 2011, within the requisite five year limitations period of Section 516.000.

ii. Two Instances of Waiver, Separate Errors

Causing Separate Items of Damage

Relators further contend that damage from both wrongs – the duplication error and the *McGinnis Rule* violation, stem from dividing indivisible damages, which occurred on the same date of trial. *See*, Relators' *Brief* at 16-17. Relators mischaracterize their errors as unitary, when there were two separate mistakes (duplication and *McGinnis Rule* errors) and two

separate instances of waiver. Waiving one mistake did not necessarily waive the other. Whether two instances of waiver occurred on the same date did not intrinsically control when the statute began running here. It is, however, probative on whether there were at least two separate items of damage, which does control when the statute commenced running.

That there were two instances of waiver at trial shows why the February 25, 2005, and May 19, 2006, reductions constituted separate items of damage under Section 516.100. If Relators had timely corrected only the *McGinnis Rule* violation, the duplication error would have persisted and the result would have been a \$4.3 M judgment.²² That is because the contract verdicts would have been reduced to \$2.15 M and then eliminated for further duplicating damages awarded in the \$4.3 M fraud verdict. In this hypothetical, the result would have been \$6.45 M, if the Eighth Circuit had not treated the remaining \$2.15 M as further duplicating the \$4.3 M fraud verdict and eliminated it. Either way, the outcome would have been greater than the actual \$2.15 M judgment. This demonstrates that there were two separate instances of waiver leading to unique items of damages.

²² Relators did not harmonize the fraud verdicts even though Missouri allows for that process. *See, Margolies, supra*, at footnote four, *citing Burnett v. Griffith*, 739 S.W.2d 712, 715 (Mo. 1987).

Moreover, assuming *arguendo* that Plaintiff had discovered on February 25, 2005, that Relators had waived the duplication error, nothing about that knowledge would have rendered damages from their waiver of the *McGinnis Rule* error sustained and ascertainable before May 19, 2006. No doubt, through May 19, 2006, the \$4.3 M reduction (Plaintiff argues the \$2.15 M too) was a mere potentiality and Plaintiff could not have successfully maintained a suit to recover those damages before then. Eddleman v. Dowd, 648 S.W.2d 632, 633 (Mo.App. E.D. 1983); Cain v. Hershewe, 760 S.W.2d 146, 149 (Mo.App. S.D. 1988); Wallace v. Helbig, 963 S.W.2d 360, 361-62 (Mo.App. E.D. 1998); *see also*, Linn Reorganized School Dist. No. 2 of Osage County v. Butler Mfg. Co., 672 S.W.2d 340, 343 (Mo. banc 1984) (“Where the potentiality of future harm is not clear, however, limitations should not run until damages become recoverably certain.”) (internal quotes omitted) and *Point I*.

b. If Single Wrong and Separate Items of Damage, the Statute Still Did Not Commence Running Before March 10, 2006

Assuming, nonetheless, that allowing the jury to divide indivisible damages or that waiver were the sole wrong does not change the result in this case. Whether or not multiple trial errors occurred on the same date does not control, because the breach or wrong itself does not trigger the

statute. That there were separate items of damage ascertainable on different dates, regardless of one wrong or two, determines when the statute commenced running. Section 516.100 does not require two wrongs, merely two items of damage to delay running. Separate items of damage are simply more obvious when there are two wrongs.

Relators rely on M&D Enterprises, Inc. v. Wolff, 923 S.W.2d 389, 395-97 (Mo.App. S.D. 1996) for their contention that, here, the statute commenced running on February 25, 2005, because Plaintiff sustained some, if not all, damage. *See*, Relators' *Brief*, at 13-14; *see also*, *Point II (A)*. Conspicuously, Relators omit Linn, *supra*, and Verbrugge, *infra*, from their analysis. These cases demonstrate why Respondent correctly applied Section 516.100 to these facts, even assuming a single wrong, in denying summary judgment and why the Appellate Court properly denied Relators' application for writ.

i. Linn

Linn involved an allegation of a single wrong, i.e. defective construction of a roof structure. Linn, *supra*, at 341-43. The plaintiff discovered the defective condition in July 1972, because the roof leaked from the time it was first constructed. Id. at 341-42. The plaintiff filed suit in October of 1977. Id. at 340. During the final stage of construction, in

November 1972, the plaintiff discovered that the roof leaked onto the floor below it, causing damage to the flooring. Id. at 342. The plaintiff claimed damage to the flooring as its second item of damage. Id.

The plaintiff's October 1977 filing was within five years of the November 1972 ascertainable damage to the flooring, but not within five years of the plaintiff's July 1972 discovery of the leaking roof structure itself. Id. at 341-43. The defendants moved for summary judgment arguing, as Relators do here, that the statute of limitations barred the plaintiff's claims because, *inter alia*, the plaintiff had sustained *some* ascertainable damage (in July 1972 to the roof) from a single wrong (defective roof construction) more than five years prior to filing the suit to recover those very same damages. Id. The plaintiff countered that any damages the leaking roof caused to the floor were a separate item of damage, so that the statute did not commence running until the damage to the floor was in fact sustained and ascertainable. Id.

This Court ruled that, unlike the leaking roof, of which the plaintiff was aware from an early stage of the project, the damages to the floor were not sustained and ascertainable until the final stage of the project – at least until after it was installed. Id. at 342. This Court did not require the plaintiff in Linn to file suit from its first item of damage and use a future damages

jury instruction to recover the second item of damage. This Court rightly reasoned that forcing plaintiffs to sue from the earliest points of an ongoing project made no practical sense. Id. at 343. That reasoning is especially compelling when the second item of damage may never become fact.

Verbrugge v. Abc Seamless Steel Siding, 157 S.W.3d 298, 302-03 (Mo.App. S.D. 2005) (“The past is often difficult to ascertain, much less the future.”).

Logically the floor could not have sustained the fact of damage until it had been installed. Relators confuse foreseeability of some possible damages as the same thing as having actually sustained ascertainable damages. No doubt any reasonable layperson in Linn could have foreseen that the leaking roof would damage the flooring once it was installed, so that in a sense damage to the flooring was “knowable” or “ascertainable” before the floor was in fact installed. Nonetheless, this Court held that Section 516.100 did not bar the plaintiff’s claim of damage to the roof structure, which was known to be leaking more than five years before the plaintiff filed suit, or to the flooring, which was within five years of filing suit. Id. at 433. This Court did not limit the plaintiff’s damages to the five years immediately preceding the suit being filed, and assuming a single wrong, nor should it limit Plaintiff to damages having occurred in the five years preceding March 10, 2006. *Compare with*, Davis v. Laclede Gas Co., 603

S.W.2d 554, 556 (In the case of a continuing wrong and continuous damages growing over time, instead of multiple or single wrongs and separate damages, the statute barred damages occurring before the five years immediately preceding filing suit); *compare with* Vebrugge, *supra*, at 302-03.

There are sound policy reasons for different results on different facts. Relators' application of 516.100 would force plaintiffs into prematurely filing suits before the plaintiff had certainly sustained some injury, only to be dismissed for failing to state a claim. *See, Eddleman, Point II (A)*. If the wrong occurred early enough in a project, or legal representation, it is conceivable that the limitations period could expire before the project or representation was completed and before the fact of the last item of damage had occurred. This would create confusion by forcing piecemeal litigation and waste judicial resources. *See, Linn, supra*, at 343 ("Where the potentiality of future harm is not clear, however, limitations should not run until damages become recoverably certain.").

As the defendants in Linn had legal and contractual duties to the plaintiff in connection with an ongoing construction project, Relators here owed Plaintiff legal and contractual duties in connection with an ongoing piece of litigation. Just as the water damage could not have become a fact

until the floor had been installed, the \$4.3 (and Plaintiff contends the \$2.15 M) could not have become a fact of damage until the Eighth Circuit's opinion became final, Relators told Plaintiff it had to accept the verdict reductions and had no viable appellate options or Relators informed Plaintiff of their errors and advised it to hire separate counsel at its cost. As in Linn, Plaintiff here should not be barred from recovering any damages from February 25, 2005, forward, even though it is more than five years prior to suit being filed.

In Linn this Court noted that the plaintiff's second item of damage was avoidable. Here, Plaintiff has alleged that Relators waived trial errors connected to the jury instructions and verdict forms by failing to correct them before the jury was discharged. If so, Plaintiff's second item of damage, the \$4.3 M reduction, was arguably unavoidable. This distinction should not change the result.

Linn acknowledged that several factors could support its special result. Rendering damages recoverably certain is the *sine qua non* of all such factors. That the later item of damage may have been avoidable was just one expression of the concept. Additionally, Linn allowed that the statute might not run where the tortfeasor may cease the wrongful conduct or, remove the dangerous condition or that injury *may* not result at all. Linn, *supra*, at 343.

That reasoning applies on the facts of this case, because it did not matter whether the waiver was fatal and discoverable before March 10, 2006, until Plaintiff sustained some item of damage independent of the outcome of the appeal it could not have successfully maintained a suit to recover any item of damage.

In Linn, the statute did not commence running from the first item of damage during an ongoing project, because its second item of damage may not have occurred at all. Here, the statute did not commence running from the first item of damage during the pending litigation, because either Plaintiff's last item of damage may not have occurred at all *or* because Relators' concealed that damages were inevitable.²³ Thus, to a reasonably prudent layperson in Plaintiff's position damages were not sufficiently recoverable before March 10, 2006.

ii. Powel

In Powel, this Court held that the statute commences running when a reasonably prudent layperson in Plaintiff's "position would have known or been put on inquiry notice not just of the wrong and nominal immediate

²³ Judge Gaitan's \$2.5 M reduction on February 25, 2005, was speculation until the Eighth Circuit affirmed it on May 19, 2006. *See, Eddleman, supra; see also, Cain and English, supra.*

injury therefrom, but also that substantial, non-transient damage ***had resulted*** and was capable of ascertainment.” Powel, *supra*, at 578 (emphasis added). The past tense use of “had resulted” comports with Linn’s holding, because statute does not commence running under Powel until the item of damage is certainly sustained. Powel did not eliminate the plain language of Section 516.100 concerning multiple items of damage.

Linn, Powel and Section 516.100 are in harmony. No doubt, had the defendants in Linn managed the plaintiff’s expectations to believe that the leaking was an acceptable result – even a good thing, concealed that their errors had caused the leaking and assured the plaintiff that it may well have the leaking stopped before the project ended – this Court would have arrived at the same result even if for additional reasons. *See, Point II (C)-(D)*.

iii. Continuous Item of Damage Growing Over Time

Applying Linn’s holding here is consistent with holdings that the statute does not toll when a continuous item of ascertainable damage grows over time. *See, Arst, supra*, at 847-48; *see also, Davis, supra*, at 556 and M&D Enterprises, Inc. v. Wolff, 923 S.W.2d 389, 395-97 (Mo.App. S.D. 1996) (Accrual of cause of action not “delayed by the fact that a person sustained later damage resulting from the ***same acts*** which also produced

earlier ascertainable damage.”) (italics in original, bold-italics added).

Unlike cracks to the same foundation that grow in number and size (Arst) or a single item of damage from one wrong that increases in value over time (M&D Enterprises), here, Plaintiff sustained items of damage that are wholly independent of each other.

Assuming a single wrong does not change the result here. Plaintiff’s second item of damage had not been sustained as a legal injury before March 10, 2006. *See, Alvarado, supra*, at 242. Unlike the plaintiffs in Arst and M&D who could have successfully maintained a suit for some item of damage more than five years before filing their claims, before March 10, 2006, Plaintiff could not have successfully maintained a suit to recover either the \$2.15 M reduction from February 25, 2005, or the \$4.3 M reduction from May 19, 2006. All damages depended on the outcome of the appeal in underlying litigation.

c. Post-Trial Wrongs and Damages

This Court need not decide whether Plaintiff’s causes of action accrued on February 25, 2005, because assuming *arguendo* that they did, Relators affirmed their negligent advice and concealed their mistakes through at least March 10, 2006.²⁴ *See*, Section 516.280 RSMo.; *see also*,

²⁴ *See, Exhibit Z*, paras. 67-73, at 14-16 (LF at 250-54).

Zero Mfg. Co., *supra*, 441 (Mo.App. E.D. 1987); Anderson, *supra*, 860-61 (Mo.App. W.D. 1984); Wright, *supra*, 775, 777 (Mo.App. W.D. 2009); *see also*, *Point II (C)-(D)*.

Alternatively, Relators' failure to disclose their wrongs, or likely errors, as the basis for the February 25, 2005, reduction was itself actionable, so that Plaintiff suffered a continuing wrong and the injury renewed each day through March 10, 2006. *See*, Klemme v. Best, 941 S.W.2d 493, 495 (Mo. banc 1997); *see also*, Anderson, *supra*, at 860-3; Davis, *supra*, 556; Cook, *supra*, 102-04; *and*, *Point II (E)*.

3. CONCLUSION

Plaintiff sustained separate items of damage with the last item being first ascertainable within five years of filing suit. Under Section 516.100 Plaintiff is entitled to recover all damages arising from the Relators' negligence pleaded in its *First-Amended Petition*, including the February 25, 2005, and May 19, 2006, reductions.

**II (C) NO REASONABLY PRUDENT PERSON IN
PLAINTIFF'S CIRCUMSTANCES COULD HAVE ASCERTAINED
DAMAGES BEFORE MARCH 10, 2006.**

**1. Before And After March 10, 2006, Relators Affirmed
That The \$6.45 M Judgment Was A Good Result And Concealed Their
Mistakes**

This Court does not have to decide whether Plaintiff's causes of action accrued on February 25, 2005, because before and after March 10, 2006, Relators affirmed their advice to Plaintiff and concealed their mistakes, assuring it that: a) the outcome at trial, \$6.45 M judgment, was consistent with Relators' pre-trial advice to Plaintiff about what it should expect to recover (*Facts 10, 11, 12, 34, 35 (Appendix at A8-9, A12); Exhibit CC (LF at 305-06, 314)*); b) the \$2.15 M reduction was exclusively caused by the trial court error in refusing to submit Relators' preferred verdict form (*Facts 30, 32, 33 (Appendix at A11-12); Exhibit CC (LF at 311-13)*); c) the trial judge was one of the most reversed on the bench (*Id.*); d) Plaintiff had a good possibility of recovering the \$2.15 M on appeal (*Id.*); e) Plaintiff would maintain the \$6.45 M judgment (*Facts 30, 32, 33, 51, 54 (Appendix at A11-12, A14-15); Exhibit CC (LF at 311-13, 320-321)*); and, f) the judgment

was a “A GOOD THING!!!” (*Facts 28, 29 (Appendix at A11); Exhibit CC*) (LF at 311)).

a. *Plaintiff Had The Right To Rely On Relators’ Continued Legal Advice Through March 10, 2006.*

Plaintiff had the right to rely on Relators’ continued advice that the February 25, 2005, reduction was caused by trial court’s erroneous rejection of Relators’ preferred verdict form and assurances that it had a reasonable chance of recovering the \$2.15 M on appeal, or certainly maintaining the \$6.45 M. Additionally, Plaintiff had the right to rely on Relators’ advice that the \$6.45 M judgment was a good result. *Wright, supra*, at 771-75, (“A cause of action for professional malpractice cannot begin to run until the plaintiff knew or should have known [of] any reason to question the professional’s work.”). In *Anderson*, the court provided:

As a layman, [plaintiff] cannot be expected to double check every act (or failure to act) [...] [I]t would be absurd to require a client, in addition to hiring an attorney, to make a layman’s investigation to determine whether the attorney had done his job properly or was forwarding important papers to him.”); *Klemme, supra*, at 497 (Mo. banc 1997) (client is “under no duty to double check [defendant attorney’s] work as long as [defendant] was his attorney[.]”

684 S.W.2d 858, 861-62. In Joyce the court held that:

During the course of an attorney-client relationship, Missouri does not impose upon a layperson the duty to double-check the attorney's work or *to understand that an attorney's conduct caused harm unless a source external to the attorney-client relationship reasonably puts the layperson on notice the attorney has caused some harm.*

635 F.3d 364, 368 (emphasis added).

Relators' argument that in *some* legal malpractice cases the statute of limitations *may* commence running while underlying litigation remains pending ignores that Plaintiff had the right to rely on an their advice concerning complicated legal issues in complex litigation. The \$2.15 M reduction did not constitute something external to Relators' representation so that Plaintiff should have questioned their advice before March 10, 2006. *See, Joyce, supra*, at 368. To be sure, the \$6.45 M judgment was consistent with the outcome Relators had prepared Plaintiff to expect, so no reasonably prudent person in Plaintiff's position could have been on notice of a potentially actionable injury. *See, Point II (C)-(D)*. And by denying that they committed any wrongs or caused any items of damage, Relators claim none.

**b. *Through March 10, 2006, Relators Concealed
That Their Mistakes Caused The February 25, 2005, Reduction.***

Relators owed Plaintiff the duties of undivided loyalty and fidelity. They had an affirmative duty to advise Plaintiff of material developments in the case. Klemme, *supra*, at 495 (“In addition [to exercising due care or honoring express contract commitments], an attorney has the basic fiduciary duty obligations of undivided loyalty and confidentiality.”); Anderson, *supra*, at 860-63 (“In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters handled for the client”); *see also*, Rule 4-1.4(a)(1). To the extent this Court finds that, in the circumstances, a reasonably prudent person would have ascertained damages on February 25, 2005, it should charge Relators’ with that knowledge. If Relators are reasonably prudent persons, then they must have known that they had damaged Plaintiff and they had the duty to advise Plaintiff of this material development. Id.

The law will not reward Relators by allowing them to count against Plaintiff the time that they kept their silence in violation of their duties to Plaintiff. Anderson, at 863 (After attorney hid mistakes, “[t]o then let [the] attorney hide behind a strict interpretation of the statute of limitations would

not promote justice and would leave the client with no relief”). Relators should not be allowed to avoid Plaintiff’s claims by arguing that Plaintiff should have known the very information that Relators withheld from it. Id. at 863 (“The problem of a stale claim was the [defendants’] own fault and they cannot now be heard to complain.”). Relators hid the keys to the courthouse doors. Id. at 862 (“In the present case [Relators] in a sense held the keys to the courthouse door. [Relators] knew of the potential of and actual happening of default judgment [trial errors and waivers] all along and at any point during those six years could have informed his client.”) (bracketed material added).

Thus, even assuming *arguendo* that Plaintiff’s causes of action accrued on February 25, 2005, the statute did not commence running before March 10, 2006, as the result of Relators’ actionable conduct pleaded in Plaintiff’s *First-Amended Petition And Affirmative Avoidances*. Exhibit Z (LF at 250-54). Dixon v. Shafon, 649 S.W.2d 435, 439 (Mo. banc 1983) (“When all the facts are known a court will seldom find that a party is estopped to plead the statute of limitations, *unless he has made positive efforts to avoid bringing of suit against him, or unless he has in some way misled the claimants.*”) (emphasis added); *see also*, Section 516.280 RSMo. (“If any person, by absconding or concealing himself, *or by any other*

improper act, prevents the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.” (emphasis added).

**2. A Reasonably Prudent Lay Person In Plaintiff’s
Position Could Not Have Known To Hire Outside Legal Counsel By
March 10, 2006**

Since Relators misled Plaintiff about material matters adverse to its interests in violation of their duties, a reasonably prudent person could not have known to hire independent legal counsel and incurred additional fees as damages by March 10, 2006. Powel, *supra*, at 578. No doubt, assuming that by March 10, 2006, Plaintiff had read the trial court’s February 25, 2005, order reducing the verdict by \$2.15 M, it still reasonably had to rely on Relators to explain its meaning. Joyce provides:

[Defendants] contend that [plaintiff] was on notice of a potentially actionable injury at the very moment he signed the agreements because their effect [...] could be gleaned from the agreements’ obvious language and would therefore be ascertainable upon the signing of such agreements. We disagree as to [plaintiff’s] knowledge of the effect of the agreements, standing alone, serving as notice of a potentially actionable injuries under the circumstances pleaded in

[plaintiff's] complaint. [Plaintiff], of course, knew the effect of the agreements was to transfer his rights in the Heuristic Firewall to TechGuard. To prevail on its statute of limitations defense, however, [defendants] must prove a reasonably prudent person in [plaintiff's] position would not only know of the effect of the agreements, but would also know the effect of the agreements would give rise to a potentially actionable injury [...] [Defendants] represented [plaintiff] when the firm allegedly told him he would not be injured by signing the agreements, and thus he had a right to rely upon such representation.

635 F.3d 364, 367-68; *see also*, Klemme, *supra*, 497; Anderson, *supra*, at 862.

Likewise, had Plaintiff here ascertained a setback, it does not mean that as a layperson represented by Relators it could have known that their advice was conflicted, self-serving or wrong. *See*, Zero Mfg. Co., *supra*, at 441 (at earliest statute begins running after the date attorneys last affirmed their negligent advice [Relators admit this was after March 10, 2006 (LF at 311-12)]]; Anderson, *supra*, at 860-61 (Ignorance of the plaintiff's cause of action will not prevent the statute from running, "*except when that ignorance is totally caused by the actions or inactions of an attorney upon*

whom the client is relying. While it is true that [plaintiff] could have maintained a suit on the date of the default judgment was entered, that presupposes [plaintiff's] ability to be omniscient.”) (emphasis added).

Here, the only way a reasonably prudent person in Plaintiff's position could have known to disregard Relators' advice was to be an attorney, consult an attorney or be omniscient. That is not what the law requires. *See, Wright, supra*, at 774-77. On these facts, a reasonable person would have concluded just as Plaintiff did here, that the \$6.45 M was a reasonable outcome and would not have questioned Relators' work.

This principle is particularly applicable here because Relators distinctly communicated to Plaintiff the impression that it had outside legal counsel. Exhibit V (LF at 154). At their own cost Relators hired appellate counsel to assist them in writing the appellate brief and assured Plaintiff that this would help recover the \$2.15 M on appeal. (*Id.*). The *Preliminary Writ* should be quashed and Respondents' *Petition* denied without further inquiry.

II (D) PRIOR TO MARCH 10, 2006, UNDER THE RELEVANT FACTS OF THIS CASE, A REASONABLY PRUDENT LAYPERSON IN PLAINTIFF’S POSITION COULD NOT HAVE BEEN ON NOTICE OF THE WRONGS AND NOMINAL IMMEDIATE INJURY THEREFROM, NOR THAT *SUBSTANTIAL NON-TRANSIENT DAMAGE* HAD RESULTED AND WAS CAPABLE OF ASCERTAINMENT

Under the totality of circumstances here no reasonable layperson in Plaintiff’s position could have objectively been on notice of a “wrong and nominal immediate injury therefrom, but also that substantial, *non-transient damage had resulted* and was capable of ascertainment.” Powel v. Chaminade, 197 S.W.3d 576, 578 (Mo. banc 2006) (emphasis added).

The facts here are: a) the outcome at trial, i.e. \$6.45 M judgment, was consistent with Relators’ pre-trial advice to Plaintiff about what it should expect to recover (*Facts 10, 11, 12, 34, 35 (Appendix at A8-9, A12); Exhibit CC* (LF at 305-06, 314)); b) before and after March 10, 2006, Relators’ advised Plaintiff that the \$6.45 M judgment was a good result (*Facts 28, 29 (Appendix at A11); Exhibit CC* (LF at 311)); c) before and after March 10, 2006, Relators advised Plaintiff that the only error in the case was caused by the trial court’s refusal to use Relators’ tendered “Verdict Form C” (*Facts*

30, 32 (*Appendix* at A11); Exhibit CC (LF at 311-13)); d) before and after March 10, 2006, Relators affirmed their advice, including by appealing, that Plaintiff had a good possibility of recovering Judge Gaitan's \$2.15 M reduction (*Facts* 32, 33, 39, 54 (*Appendix* at A11-13, A15); Exhibit CC (LF at 312-13, 316, 321)); e) before and after March 10, 2006, Relators affirmed their advice that Plaintiff would maintain its \$6.45 M judgment (*Facts* 31, 32, 54 (*Appendix* at A11-12, A15); Exhibit CC (LF at 312-13, 316, 321)); and, f) Relators hired outside legal counsel at their own expense to assist them in writing the appellate briefs giving Plaintiff the strong misimpression that it had outside legal counsel (*Fact No. 39* (*Appendix* at A13); Exhibit CC (LF at 316)).

A reasonably prudent layperson in Plaintiff's position could not have been on "inquiry notice" of the wrong and nominal immediate injury therefrom, much less that "*substantial non-transient damage*" had been sustained and was capable of ascertainment before March 10, 2006. Powel, *supra*, at 578. In Powel, this Court synthesized forty years of precedent on when damages are sustained and capable of ascertainment under Section 516.100 RSMo. This Court provided, "*the statute of limitations begins to run when the 'evidence was such to place a reasonably prudent person on notice of a potentially actionable injury.'*" Id. at 582 (emphasis in original).

Even ignoring that this sentence assumes that an injury had in fact occurred, does not mean that the statute of limitations commenced running before March 10, 2006. Plaintiff's application of the statute does no violence to the "inquiry notice test" in Powel.

As a layperson Plaintiff could not have understood the import or cause of "inconsistent" verdicts or "duplicate" damages in the February 25, 2005, order reducing the verdicts by \$2.15 M. To be sure, only upon hiring an expert could Plaintiff have discovered Relators' actionable conduct.

Anderson, *supra*, at 860-61. It is well-settled Missouri law that, absent something external to the professional relationship to cause the client to question attorneys, clients have the right to rely on an attorney's advice and do not have the obligation to hire attorneys to review their attorneys' work. Joyce, *supra*, at 367-78. Of course, allegations by opposing counsel that Plaintiff was not entitled to damages cannot be a source external to the relationship or the statute would run from every answer denying a petition. We know that is not how the system works.

Relators' *Brief* cites approvingly to cases holding that clients do not have to second-guess their attorneys' advice or understand the legal reasoning of court orders even if when they are public record. *See*, Klemme, *supra*; *see also*, Anderson, *supra*, at 861 (Mo.App. W.D. 1984) ("The

[defendants] contend that because the default judgment was a matter of public record that damages were capable of ascertainment on [the date of entry].²⁵ While that is literally true, the facts in this case mitigate against strict adherence to the ‘capable of ascertainment’ interpretations in [cases cited by the defendants].”) Since in Anderson, like here, the defendant attorneys concealed their errors from the plaintiff, the next sentences bear repeating:

As a layman, [plaintiff] cannot be expected to double check [*sic*] every act (or failure to act) of his attorney. While it is clear that [plaintiff] could not collaterally attack the default judgment, and is

²⁵ A default judgment imposing liability where none was expected is certain damage to some degree, even if measured solely by the otherwise unnecessary litigation costs and attorney’s fees incurred to avoid the liability, and thus triggers the statute. This is not new. See Wilson, *supra*, at 883-84 (for limitations activation client must make expenditures with the realization they were caused by attorney’s negligence). Neither is it comparable to the facts *sub judice*, because here a reasonably prudent person in Plaintiff’s position could have objectively considered the \$6.45 M judgment a good result. That is, of course, only if the person was unaware that the attorneys had made mistakes leading to the reduction.

held to the constructive knowledge of anything his attorney knew, it does not follow that plaintiff constructively knew, *vis-à-vis* the time to bring suit, those same facts with regards to a malpractice suit against the very attorney who concealed those facts from him.

684 S.W.2d at 861.

A client cannot, as a matter of law, be held to ascertain damages from the mere fact that a court enters an order, which may or may not end up damaging the client. This is particularly true when, as here, the attorney conceals the material fact that whatever damage may result from the order was caused by legal negligence. Strict interpretation of the statute of limitations is unjust when the “experts were capable of ascertaining plaintiff’s injuries, but the plaintiffs were not capable of doing it themselves.” Anderson, *supra*, at 862.

No doubt, as a layperson, Plaintiff could not have been aware of “at least some of the acts forming the basis” of its claim by March 10, 2006. M&D Enterprises *supra*, at 395-97; *see also*, Ferrellgas, *supra*, at 617. A layperson could not possibly understand the nuances of the complex legal issues in this case or that the reduction could have been caused by attorney neglect while the underlying litigation remained pending. Joyce, *supra*, at 367-368; *see also*, Husch & Eppenberger, LLC, *supra*, at 367 (Mo.App.

E.D. 2006) (Damages were not sustained and capable of ascertainment until the underlying litigation was final, because until the court determined what disputed language in an agreement meant a reasonably prudent layperson could not have known what the language meant).

Plaintiff's application of Section 516.100 does not require that a legal malpractice plaintiff understand the nature of the legal malpractice to ascertain damages to trigger the statute. Plaintiff is simply arguing that, in the context of the relevant facts here, the \$2.15 M reduction would not have caused a reasonably prudent person to question Relators' work triggering the statute under Powel. The statute did not commence running before March 10, 2006.

II (E) ALTERNATIVELY, IF THIS COURT FINDS THAT PLAINTIFF'S LAST ITEM OF DAMAGE DID NOT DELAY ACCRUAL OF ALL OF PLAINTIFF'S CLAIMS, IT SHOULD DENY RELATORS' PETITION FOR WRIT AS TO DAMAGES THAT WERE NOT ASCERTAINABLE UNTIL MARCH 10, 2006, OR AFTER

Alternatively, if this Court finds that the May 19, 2006, reversal of the \$4.3 M fraud verdict (or any other post-trial items of damage alleged) was the result of a continuing or repeated wrong that caused continuous damages

from the February 25, 2005, \$2.15 M reduction, then it should deny Relators' *Petition* as to damages sustained within the five years prior to plaintiff's filing this lawsuit on March 10, 2006. *See, Davis, supra*, at 556.

In Cook v. Desoto Fuels, Inc., the court explained:

[I]f the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire damage accrues in the first instance, [then] the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and create a fresh injury from day to day, and the wrong is capable of being terminated, [then] a right of action exists for the damages suffered within the statutory period immediately preceding suit.

169 S.W.3d 94, 104 (Mo.App. E.D. 2005) (both bracketed "then" in original). The Cook court continued, "when there are *continuing or repeated wrongs* that are capable of being terminated, successive causes of action accrue every day the wrong is repeated, the end result being that the plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period immediately preceding the lawsuit." Id. at 105 (emphasis in original).

Here, Plaintiff has alleged *alternatively* that Relators' concealment or

failure to disclose their errors, or likely errors, was a wrong that continued or repeated daily through at least March 10, 2006, and was capable of being terminated had Relators advised Plaintiff of their likely mistakes and told them to obtain independent legal counsel. Exhibit Z (LF at 243-44, 252-54). Since Plaintiff has alternatively alleged later occurring damage, e.g. the May 19, 2006, reversal of the \$4.3 M fraud verdict or converted attorneys' fees, only the February 25, 2005, reduction would be time-barred. The \$2.15 M reduction would be the only loss sustained beyond the limitations period. If this Court finds a single wrong, Linn controls, because Plaintiff's legal injury was not substantially complete before March 10, 2006. This alternative only controls upon finding one continuous item of damage from a single wrong. *See*, 516.100; *see also*, Linn, *supra*, and Alvarado, *supra*, 242.

CONCLUSION

Whether the multi-lined verdict form was reversible error or not, Plaintiff has alleged Relators negligently caused at least \$6.45 M in liquidated damages by failing to avoid or timely identify and correct, preserve and appeal at least two errors: allowing the jury to divide indivisible damages and allowing the jury to enter an impossible verdict under the *McGinnis Rule*.

Relators admit that Plaintiff's \$8.6 M in damages was indivisible. Thus, Relators should have educated the jury to award the full \$8.6 M on every verdict or special interrogatory for every theory believed on the evidence. When confronted by the jury's verdicts dividing indivisible damages Relators should have identified the error and requested that Judge Gaitan correct the error before the jury was discharged. Minimally, Relators should have preserved the error in Rule 51 objections and in Rule 59 post-trial motions and on appeal. They failed and negligently damaged Plaintiff by \$2.15 M.

Further, Relators should have known that the record and "*Jury Instruction 7*" instructing on *respondeat superior* liability meant that the jury could only hold the corporate defendant liable to the extent it found at least one individual defendants liable. Relators should have educated the jury to enter the full \$8.6 M against the corporate defendant and at least one individual defendant. Minimally, Relators should have timely identified the *McGinnis Rule* error and harmonized it before the jury was discharged as Missouri law allow. Relators' failure to correct the impossible fraud verdict damaged Plaintiff \$4.3 M.

These independently wrongful acts caused damages that were unascertainable until the Eighth Circuit affirmed Judge Gaitan's \$2.15 M

reduction and further reduced the verdicts by \$4.3 M on May 19, 2006.

Having filed its *Petition* on March 10, 2011, within five (5) years of sustaining ascertainable damage, Plaintiff's suit was timely filed.

Respondent and the Western District Court of Appeals reached the correct result, regardless of reasoning. This Court should quash the preliminary writ and deny Relators' Petition.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that *Respondent's Brief* was served this January 10, 2013, on *Respondent via email* and *via* the court's electronic filing system and regular U.S. post, first-class, upon the following:

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RULE 84.06(c) CERTIFICATION

The undersigned certifies that *Respondent's Brief* complies with Rules 55.03 and 84.06(b) and totals 15,338 words. Any disc containing this *Brief* in Word format has been scanned and is virus free.


